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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CEMEX, S.A.,
Petitioner,
v.

UNITED STATES OF AMERICA,
THE AD HOC COMMITTEE OF AZ-NM-TX-FL
PRODUCERS OF GRAY PORTLAND CEMENT,
and APASCO, S.A. de C.V.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

IRWIN P. ALTSCHULER
Counsel of Record
DAVID R. AMERINE
CLAUDIA G. PASCHE
SUZANNE M. DOHRER

MANATT, PHELPS & PHILLIPS
1200 New Hampshire Ave., N.W.
Suite 200
Washington, D.C. 20036
(202) 463-4300
Counsel for Petitioner

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QUESTION PRESENTED

Is the Secretary of Commerce precluded from interpreting 19 U.S.C. § 1677b, a provision of the U.S. antidumping law, in a manner consistent with the language and fundamental purpose of the antidumping statute (19 U.S.C. § 1673 *et seq.*), and with the international obligations of the United States under the General Agreement on Tariffs and Trade (GATT), to ensure that antidumping duties are imposed only in amounts necessary to offset unfair pricing?

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, Petitioner CEMEX, S.A., states that it has no parent corporation. CEMEX does, however, have a number of subsidiaries worldwide. These subsidiaries (except wholly-owned subsidiaries) are set out at Appendix 87a.

The respondents in this case are the United States Department of Commerce, International Trade Administration (hereinafter "Commerce Department"), which was one of the Defendant-Appellees in the Court of Appeals, Apasco, S.A. de C.V. (wholly owned by "Holderbank" Financiere Glaris Ltd., a publicly-owned Swiss corporation), which also appeared as a Defendant-Appellee below, and The Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement, consisting of BoxCrow Cement; Florida Crushed Stone Co., Riverside Cement Co., North Texas Cement Co., Holnam, Inc., Phoenix Cement Co., Southdown, Inc. and Texas Industries, Inc., which appeared as Plaintiff-Appellant below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, CEMEX, S.A., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit entered in this case.

OPINIONS BELOW

The judgment of the U.S. Court of Appeals for the Federal Circuit in *Ad Hoc Committee v. United States* is reported at 13 F.3d 398 (1994), and is reprinted in the Appendix at 1a. The decision below of the U.S. Court of International Trade is reported at 787 F. Supp. 208 (1992), and is reprinted in the Appendix at 13a.

The Commerce Department determination which is the subject of this litigation was published in the *Federal Register* at 55 Fed. Reg. 29,244 (July 18, 1990), and is reprinted in the Appendix at 26a. The order of the Court of Appeals denying Petitioner's petition for rehearing is unreported and is reprinted at Appendix 64a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 5, 1994. The Court of Appeals denied Petitioner's petition for rehearing on March 1, 1994. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

The following statutory provisions are relevant to this case and are set out in the Appendix at 66a-71a: 19 U.S.C. § 1677a (1988) (calculation of U.S. price) and 19 U.S.C. § 1677b (1988) (calculation of foreign market value).

STATEMENT OF THE CASE

This petition seeks review of a decision of the U.S. Court of Appeals for the Federal Circuit which, if allowed to stand, will preclude the Commerce Department from interpreting the antidumping statute in a manner consistent with its fundamental purpose and will result in determinations that do violence not only to that purpose, but also to the international obligations of the United States under the General Agreement on Tariffs and Trade (GATT).

A. The U.S. Antidumping Statute

The U.S. antidumping statute, originally enacted in the Antidumping Act of 1921,[1] and now set out at 19 U.S.C.

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[1] Antidumping Act, 1921, ch. 14, 42 Stat. 11 (1921) (App. 75a).

§ 1673 *et seq.*[2], provides for the imposition of antidumping duties on imported merchandise which is sold in the United States at less than fair value.[3] The purpose of the additional duty is to offset the "margin of dumping" so as to equalize the prices of the merchandise in the U.S. and foreign markets,[4] thus depriving the foreign producer of any advantage it may have gained by dumping.

Pursuant to 19 U.S.C. § 1673 *et seq.*, the United States may impose antidumping duties on imported merchandise if two conditions are met: first, the administering authority[5] must determine that the imported merchandise is being, or is likely to be sold in the United States at

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[2] Trade Agreements Act of 1979, Pub. Law 96-39, 93 Stat. 162 *et seq.* (1979), as amended. The Trade Agreements Act technically repealed the Antidumping Act of 1921, but while making fairly substantial structural and procedural changes to the earlier law, "relatively little change [was] made in the substantive provisions of the law." H.R. Rep. No. 317, 96th Cong., 1st Sess. 59 (1979). *See also Matsushita Electric Industrial Co. Ltd. v. United States*, 529 F. Supp. 670, 674 (CIT 1981) ("Congress evinced a general intention to carry forward the antidumping law and its judicial and administrative precedents without substantive changes except as specifically noted.")

[3] The term "fair value" has not been defined by statute, but by regulation. The Treasury Department, which was the original administrator of the antidumping law, defined fair value at section 14.7 of its regulations. 19 C.F.R. § 14.7 (1956). The Department of Commerce definition is currently at 19 C.F.R. § 353.42 ("Fair value, used during the investigation, is an estimate of foreign market value.").

[4] The antidumping duty imposed is equal to the amount by which the foreign market value exceeds the U.S. price for the merchandise. 19 U.S.C. § 1673.

[5] The antidumping statute was administered by the Treasury Department until 1980. On January 2, 1980, administration of the antidumping law was transferred from the Secretary of the Treasury to the Secretary of Commerce. Reorg. Plan No. 3 of 1979, § 5(a)(1)(C), 44 Fed. Reg. 69,275, *reprinted in* 19 U.S.C. § 2171 (1988).

less than fair value; and second, the U.S. International Trade Commission must determine that an industry in the United States is suffering from or is threatened by material injury as a result of imports of that merchandise.[6] If both agencies make affirmative determinations with respect to these issues, the Commerce Department publishes an antidumping order in the *Federal Register.*

The calculation of the *amount* of the antidumping duty to be imposed on imported merchandise requires the Commerce Department to determine the price of the subject merchandise in the foreign market and the price in the U.S. market. Since prices in these markets may be different for many reasons other than dumping, the statute provides for certain adjustments to the prices in each market in order to allow a fair comparison of the two. The methodology for calculating the price of the merchandise in the United States ("U.S. price") is set forth in 19 U.S.C. § 1677a (App. 66a),[7] while the methodology for calculating the price of the merchandise in the foreign market is set out in 19 U.S.C. § 1677b ("foreign market value", or "FMV") (App. 68a). In each antidumping investigation, the Commerce Department collects information from the foreign producers of the subject merchandise regarding its prices in both markets, and makes adjustments to the reported prices in accordance with the U.S. price and foreign market value provisions of the statute in order to achieve a fair comparison and an ac-

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[6] For a more extensive discussion of the administration of the antidumping law, see Stephen J. Powell, Craig R. Giesse & Craig L. Jackson, *Current Administration of U.S. Antidumping and Countervailing Duty Laws: Implications for Prospective U.S.-Mexico Free Trade Talks,* 11 Nw. J. Int'l L. & Bus. 177 (1990).

[7] U.S. price is either "purchase price," for sales made to unrelated customers for export to the United States, or "exporter's sales price," for sales made to related importers for resale in the United States.

curate calculation of the amount of duty necessary to offset the margin of dumping.[8]

B. The Mexican Cement Determination

On October 23, 1989, the Commerce Department initiated an antidumping investigation with respect to imports of gray portland cement and clinker (hereinafter "cement") from Mexico. 54 Fed. Reg. 40,531 (1989). In its final determination of sales at less than fair value, the Commerce Department calculated U.S. price and foreign market value after taking into account various adjustments to the sales price in each market. 55 Fed. Reg. at 29,245-246, App. 30a-33a. The sole issue involved in this petition is the Court of Appeals decision that the Commerce Department's deduction of presale transportation costs from foreign market value was contrary to the statute.

The statute neither prohibits this adjustment to foreign market value, nor expressly provides for it. A similar deduction is, however, expressly required in the calculation of U.S. price. In its determination, the Commerce Department explained that given the adjustment required in the U.S. price provision, it was deducting pre-sale transportation expenses in the foreign market from foreign market value in order "to ensure an 'apples-to-apples' comparison [of prices]." 55 Fed. Reg. at 29,251, App. 55a.

The U.S. producers of cement challenged this determination before the U.S. Court of International Trade,[9] arguing that the language of the antidumping statute pre-

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[8] *See also, generally,* 19 C.F.R. Part 353 (Department of Commerce, International Trade Administration antidumping regulations).

[9] Pursuant to 28 U.S.C. § 1581(c), the U.S. Court of International Trade has exclusive jurisdiction over actions commenced to challenge final determinations in antidumping cases under 19 U.S.C. § 1516a.

cludes the deduction of pre-sale transportation costs from foreign market value, and disputing the authority of the Commerce Department to make adjustments not specifically set out in the statute in order to ensure fair, apples-to-apples price comparisons. The court rejected the arguments raised by the plaintiff, and affirmed the determination made by the Commerce Department. The court held that "the deduction of pre-sale inland freight expenses on the home market side engenders a more accurate and meaningful comparison than does plaintiff's approach. . . ." *Ad Hoc Committee v. United States*, 787 F. Supp. 208, 213 (CIT 1992), App. 21a.

On appeal, the Court of Appeals for the Federal Circuit reversed the Court of International Trade's decision and held that the Commerce Department had no authority to deduct pre-sale transportation costs from foreign market value, even if the agency's intent was to ensure fair, apples-to-apples price comparisons. The court reasoned that the existence of an express provision for a deduction from sales price in one part of the statute *necessarily* means that the omission of a similar deduction in another provision of the same statute was intentional. Accordingly, the court held that the Commerce Department had no authority to deduct pre-sale transportation costs from foreign market value in order to effect a more accurate and fair comparison of prices.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in this case undermines the essential purpose of the antidumping statute, which is to offset as precisely as possible the amount by which the price of merchandise sold in the foreign market exceeds the price for the same merchandise when sold in the United States. The court's improper application of principles of statutory construction, and failure to consider the purpose of the statute, will result in the imposition of excessive antidumping duties in this case, and in many other antidumping proceedings. The decision of

the court below failed to give proper deference to the agency's interpretation of the antidumping law as permitting adjustments to foreign market value which do not contravene the express language of the statute in order to ensure fair price comparisons. The decision also overturned three decades of administrative practice; will restrict the agency's ability to administer the statute according to Congressional intent; and will result in calculations that exaggerate dumping margins in a manner that violates the obligations of the United States under the GATT.

This Court should thus resolve the important, and recurring, question as to whether the Commerce Department has the authority to administer the law in a way that ensures fair and accurate dumping margins in keeping with the fundamental purpose of the statute and U.S. international obligations.

I. THE FACT THAT AN ADJUSTMENT TO PRICE WAS INCLUDED IN ONE SECTION OF THE ANTIDUMPING STATUTE BUT NOT IN ANOTHER DOES NOT COMPEL THE CONCLUSION THAT CONGRESS INTENDED TO PRECLUDE A SIMILAR ADJUSTMENT IN THE LATTER SECTION

For both U.S. price and foreign market value, the U.S. antidumping statute sets out certain adjustments that must be made to the actual sales prices in both markets. On the U.S. price side, the statute specifically calls for, *inter alia*, the deduction of:

> [t]he amount . . . attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States. . . .

19 U.S.C. § 1677a, App. 67a. The foreign market value provision in the statute (App. 68a), on the other hand, does not call for any specific deductions from the price,

but does expressly authorize the Commerce Department to "make allowance" for differences between U.S. price and foreign market value due in whole or in part to (1) differences in commercial quantities sold in the two markets; [10] (2) other differences in circumstances of sale; [11] and (3) physical differences in the merchandise compared.[12]

A. The Court of Appeals Improperly Applied the Principle of *Inclusio Unius Est Exclusio Alterius* In Denying the Commerce Department the Authority To Interpret the Antidumping Statute In Accordance With Its Fundamental Purpose

In its decision below reversing the Court of International Trade and the Commerce Department, the Court of Appeals for the Federal Circuit held that since Congress had specifically provided for the deduction of transportation costs from U.S. price, but had failed to expressly provide for such a deduction from foreign market value, the Commerce Department did not have the

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[10] 19 U.S.C. § 1677b(a)(4)(A).

[11] 19 U.S.C. § 1677b(a)(4)(B). Between 1980 and 1987, the Commerce Department apparently deducted transportation costs from foreign market value under this circumstance of sale provision. As discussed in greater detail below, this practice diverged from several decades of Treasury Department practice, which had been to make this deduction apart from the circumstance of sale provision. Pursuant to its regulations, however, in "purchase price" comparisons the Commerce Department could only deduct *direct* expenses under the circumstance of sale provision (19 C.F.R. § 353.56(a)) and, as it had generally found pre-sale transportation expenses to be indirect, the Commerce Department generally did not deduct these expenses from foreign market value if the U.S. price was purchase price. In 1987 the Commerce Department recognized that making adjustments for transportation expenses under the circumstance of sale provision resulted in unfair comparisons, and returned to the longstanding Treasury practice of deducting these expenses prior to making the circumstance of sale calculation, in order to ensure a truly fair price comparison.

[12] 19 U.S.C. § 1677b(a)(4)(C).

authority to interpret the statute as permitting such a deduction from foreign market value. The Federal Circuit rejected the argument that the absence of language describing a deduction of transportation costs from foreign market value reflected a gap in the legislation for the agency to fill, and instead held that the silence of the foreign market value provision on this point was itself a statement of Congressional intent.

The Federal Circuit panel's holding represents a reflexive application of a principle of statutory interpretation that is not meant to be applied by rote. Principles of statutory construction are only aids to interpretation, not rules to be applied blindly in all circumstances. *United States v. Castro*, 837 F.2d 441, 443 n.2 (11th Cir. 1988). The principle of construction applied in this instance (frequently referred to by the Latin phrase *inclusio unius est exclusio alterius*), like other principles of statutory construction "has its limits and exceptions and *cannot apply when the legislative history and context are contrary* to [the proposed] reading of the statute." *Id.* at 443-43 (emphasis added), *citing Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387 n.23, 103 S.Ct. 683, 690 n.23 (1983). This Court has held that principles of statutory construction "long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose." *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51, 64 S.Ct. 120, 123 (1943). *See also Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307 (9th Cir. 1992) (*Inclusio unius est exclusio alterius* principle applies only when it makes sense as a matter of legislative purpose).

In this case, the Court of Appeals interpreted the absence of parity in the two sections of the antidumping statute as a clear expression of Congressional intent. App. 8a. Consequently, the court held that it was unnecessary to look beyond the plain words of the statute to examine legislative intent, "[*e*]*ven if the statute's 'primary goal' may seem to be ill-served by not allowing the deduc-*

tion from FMV." App. 10a. What the court described as the statute's "plain language," however, is actually the complete absence of language, and the meaning of this silence in the statute is far from clear. As this Court has held, "[n]ot every silence is pregnant," *Burns v. United States*, —— U.S. ——, 111 S.Ct. 2182, 2186 (1991), *quoting State of Illinois, Dept. of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983), and while the language of the statute is certainly the starting point for interpretation, it is *not* the end of the inquiry. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056 (1980). In determining the meaning of a statute, courts must look not only to the language of the statute, but also to the design of the legislation as a whole and to its object and policy. *Crandon v. United States*, 494 U.S. 152, 110 S.Ct. 997 (1990).

Even a brief review of the statute reveals that the overall structure of the two provisions is not parallel: each takes an entirely different approach to the calculation of the respective value, with the goal being to derive a value that can fairly be compared with the other. Given the overall lack of consistency between the two provisions, the absence of language from only one cannot be given the significance attached by the court below.

The argument that little can be made of the absence of a specific provision for a deduction for transportation costs from foreign market value is particularly compelling in light of the substantial evidence showing that the decision of the Court of Appeals directly contravenes the fundamental purpose of the antidumping statute, and will compel the Commerce Department to violate the international obligations of the United States under the GATT.

1. *Congress Clearly Intended That U.S. Price and Foreign Market Value Be Calculated At the Same Level Of Trade In Order To Ensure That Antidumping Duties Offset Only the Actual Margin Of Dumping*

The purpose of the U.S. antidumping statute is to "*equalize* sales at less than the foreign home market value . . ., thereby making it unprofitable to dump goods on the markets of the United States at lower prices." H.R. Rep. No. 1, 67th Cong., 1st Sess. 23 (1921) (emphasis added).[13] *See also* S. Rep. No. 1298, 93rd Cong., 2d Sess. 123, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7186, 7267 ("no compensation or retaliation is in order" under the antidumping statute); *Chaparral Steel Co. v. United States*, 901 F.2d 1097 (Fed. Cir. 1990) (antidumping duties are intended to be solely remedial); *National Knitwear & Sportswear Ass'n v. United States*, 779 F. Supp. 1364, 1372 (CIT 1991) ("dumping duties are remedial, not penal, in nature" and are designed "to equalize competitive conditions between the exporter and American industries affected"); *C.J. Tower & Sons v. United States*, 71 F.2d 438, 443 (CCPA 1934). Since the statute is not penal in nature, but is intended only to impose a duty that offsets the margin of dumping, there is no intention that the duty collected *exceed* the amount necessary to offset the price differential in the two markets.[14]

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[13] Neither the Senate report nor the Conference report for the Antidumping Act of 1921 describes the purpose of the statute in specific language. The Conference report does state, however, that "[t]he Senate bill adopts the basis of the House bill in determining the dumping duty. . . ." Conf. Rep. No. 79, 67th Cong., 1st Sess. 21 (1921). Since the Conference report in turn adopted the Senate version of the bill (which made only one change to the House bill), the Conference report expressly accepts the underlying premise of the Antidumping Act as expressed in the House report.

[14] In its opinion, the Court of Appeals speculated that "Congress may have wanted the differential [in the two provisions of the statute] for any number of reasons, the most evident of which being

In order to ensure that the amount of the antidumping duty does not exceed the actual margin of dumping, it is critical that the prices in the U.S. and foreign markets be compared at the same point. The legislative history of the antidumping statute makes clear that Congress intended that prices be fairly compared at the same level of trade, and that this comparison generally be made at the ex-factory level—which requires the deduction of all inland freight expenses on both sides of the equation.

In 1979, Congress passed the Trade Agreements Act, which was intended to bring the U.S. antidumping law into conformity with the new GATT Antidumping Code. *See* Pub. L. 96-39, 93 Stat. 162 *et seq.* The Statement of Administrative Action for the 1979 Act, which was issued in conjunction with the actual legislation, notes specifically that "the provisions of the Trade Agreements Act and the provisions of this statement regarding the administration of U.S. law have been developed to be fully consistent with the trade agreements negotiated in the MTN [GATT Tokyo Round], and when the Act becomes effective, will permit the United States to *carry out fully its obligations under the agreements.*" Trade Agreements Act of 1979, Statements of Administrative Action, H.R. Doc. No. 96-153, 96th Cong., 1st Sess. (1979), *reprinted in* 1979 U.S. Code Cong. & Ad. News 665, 667 (emphasis added).[15]

The clearly expressed understanding of Congress that the passage of the Trade Agreements Act made the U.S.

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to increase the likelihood and size of dumping margins found by Commerce." App. 11a. The foregoing discussion demonstrates that this was clearly *not* the purpose of the statute. Moreover, such a goal would violate the GATT, a result not in keeping with the stated purpose of the 1979 Trade Agreements Act, as is discussed in greater detail below.

[15] The statements of administrative action were expressly approved by Congress in Section 2 of the Trade Agreements Act itself. Pub. L. 96-39, 93 Stat. 147 (1979).

antidumping law fully consistent with the GATT is relevant here because the GATT Antidumping Code specifically requires that price comparisons be made at the same level of trade, and that the comparison generally be made at the ex-factory level. Article 2 of the Code expressly states that:

> In order to effect a fair comparison between the export price and the domestic price in the exporting country (or country of origin) . . . , the two prices shall be compared at the same level of trade, *normally at the ex-factory level*, and in respect of sales made at as nearly as possible the same time.

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Article 2, ¶ 6, 26th Supp. BISD 171 (1980) (emphasis added).[16] Since it is the clearly expressed intent of Congress that the U.S. antidumping law be consistent with the GATT Antidumping Code, and since that Code generally requires comparisons at the ex-factory level, Congress must also have intended that the Commerce Department make price comparisons at the ex-factory level. *See also Washington Red Raspberry Comm'n v. United States*, 859 F.2d 898, 901 (Fed. Cir. 1988) (both foreign market value and U.S. price "are subject to cost adjustments in an attempt to derive values at a common point in the chain of commerce, so that the values reasonably can be compared on an equivalent basis.").

The comparisons required by the GATT and by Congress cannot be made without deducting pre-sale transportation costs from foreign market value, since failure

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[16] This language has also been carried over to the new GATT agreement signed this past April. *See Final Act Embodying the Results Of the Uruguay Round Of Multilateral Trade Negotiations*, Agreement On Implementation Of Article VI Of GATT 1994, Part I, Article 2, ¶ 2.4 (15 December 1993) ("A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level. . . .").

to make the deduction from one side of the equation would result in a distorted ex-factory to ex-warehouse price comparison. The Commerce Department's deduction of pre-sale transportation costs from foreign market value was therefore fully consistent with the goals of the antidumping statute as expressed by Congress, as well as with the international obligations of the United States under the GATT.

2. *The Fact That Congress Was Repeatedly Made Aware That the Administering Authority Was Deducting Transportation Costs From Foreign Market Value In Order To Make Fair Comparisons, and Yet Failed To Amend the Statute, Is Evidence Of Its Approval Of That Practice*

Recognizing that, in order to make the fair comparisons required by the antidumping statute, it was necessary to deduct transportation costs from *both* U.S. price *and* foreign market value, the Commerce Department, and the Treasury Department before it, routinely made an appropriate adjustment to foreign market value in order to derive ex-factory prices.[17] This practice by the ad-

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[17] For evidence of the long-standing practice at Treasury Department, see the 1957, 1961 and 1979 studies of agency practice discussed in this section. For just a few examples of the Treasury's practice of deducting transportation costs for both U.S. price and foreign market value, *see, e.g., Saccharin From the Republic of Korea*, 42 Fed. Reg. 46,091 (1977); *Saccharin From Japan*, 42 Fed. Reg. 46,091 (1977); *Monosodium Glutamate From the Republic of Korea*, 42 Fed. Reg. 10,084 (1977). For practice at the Commerce Department, *see, e.g., Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof ("AFBs") From France, et al.*, 57 Fed. Reg. 28,360, 28,397 (1992); *Stainless Steel Hollow Products From Sweden*, 57 Fed. Reg. 21,389, 21,391 (1992); *Certain Small Business Telephone Systems and Subassemblies Thereof From Korea*, 57 Fed. Reg. 8,298, 8,299 (1992); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan*, 57 Fed. Reg. 4,960, 4,967 (1992); *Tapered Roller Bearings, Four Inches Or Less In Outside Diameter, and Certain Components Thereof, From Japan*, 56 Fed. Reg. 65,228, 65,233 (1991); *Certain*

ministering authorities, which dates back over 30 years, highlights perhaps the most significant point about the absence of a specific deduction in the foreign market value provision of the statute: Congress was explicitly told numerous times—at least as early as 1957—that agency practice was to deduct transportation cost from foreign market value in order to make apples-to-apples comparisons at the ex-factory level. Notably, Congress *never amended the law to prohibit this practice,* in spite of having had ample opportunity to do so.

In 1957, the Treasury Department submitted a memorandum to Congress with respect to proposed legislation to amend the antidumping law. In its memorandum, Treasury outlined, *inter alia,* the methodology used to calculate U.S. price and "fair value" (now foreign market value). The Treasury Department explicitly told Congress that "prices must be adjusted so that they are properly comparable—which typically means a comparison f.o.b. factory." *Bills To Amend Certain Provisions of the Antidumpting Act of 1921: Hearings Before the Committee On Ways and Means, U.S. House of Representatives, On H.R. 6006, 6007 and 5120,* 85th Cong., 1st Sess. 17 (1957) ("Report Of the Secretary Of the Treasury To the Congress On the Operation and Effectiveness of Antidumping Act and On Amendments To

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Welded Carbon Steel Standard Pipes and Tubes From India, 56 Fed. Reg. 64,753, 76,760 (1991); *Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, From Japan,* 56 Fed. Reg. 41,508, 41,512 (1991); *AFBs From the Federal Republic of Germany,* 56 Fed. Reg. 31,692, 31,715 (1991); *Tapered Roller Bearings, Four Inches Or Less In Outside Diameter, and Certain Components Thereof, From Japan,* 56 Fed. Reg. 26,054, 26,056 (1991); *Gray Portland Cement and Clinker From Japan,* 56 Fed. Reg. 12,156, 12,161 (1991); *Red Raspberries From Canada,* 56 Fed. Reg. 677 (1991); *Television Receivers, Monochrome and Color, From Japan* 55 Fed. Reg. 35,916, 35,920 (1990); *Industrial Nitrocellulose From the Federal Republic of Germany,* 55 Fed. Reg. 21,058, 21,060 (1990); *Industrial Phosphoric Acid From Israel,* 52 Fed. Reg. 25,440, 25,441-42 (1987).

the Act Considered Desirable Or Necessary"). Such an adjustment obviously requires the deduction of any cost incurred in transporting the subject merchandise from the factory to the customer and, in fact, Treasury's example of a typical calculation of fair value demonstrated quite clearly to Congress that Treasury deducted transportation expenses from *both* U.S. price *and* fair value (foreign market value) in order to arrive at a fair, ex-factory comparison. *Id.* at 12-13.[18] The failure of Congress specifically to preclude such deductions after being told by Treasury that they were being made provides strong evidence that Congress had no intention of altering that practice.[19]

In 1961, the Treasury Department prepared yet another study of its practices under the antidumping act. Here again, as in the 1957 memorandum to Congress, Treasury provided a sample calculation of U.S. price and foreign market value that leaves no question that the Department routinely deducted the transportation cost on *both* sides of the equation in order to allow an ex-factory price comparison, and did so apart from the circumstance of sale provision.[20] Treasury Dept. Memorandum

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[18] The example set out in the Treasury Department report is included in the Appendix at 81a.

[19] In its 1957 memorandum, the Treasury Department did suggest that Congress amend the antidumping law to authorize adjustments to foreign market value for "circumstances of sale," which Treasury believed could not be made under the law as written. Congress adopted the recommendations offered by the Treasury Department and amended the law to allow such adjustments. Pub. L. No. 85-630, 72 Stat. 583 (1958). This suggestion, and the subsequent amendment, were entirely unrelated to the deductions that the Treasury Department was already making for foreign market transportation costs.

[20] Considering that circumstances of sale adjustments are discussed in an entirely separate part of its 1957 memorandum, the Treasury Department evidently was not making its transportation cost adjustments as a circumstance of sale, even after this provision

Relating To Antidumping Act, 1921 (August 1961), *reprinted in* I.S.D. Metzger, *Law of International Trade: Documents and Readings* (1966) at 745, 746-47. Following this sample calculation, the Treasury Department explained that:

> The price comparison to be made under the Antidumping Act, therefore, is not between the $1.00 paid by the French home consumption purchaser and the $1.00 paid by the United States purchaser. It is, instead, a comparison between the $.95 f.o.b. factory price paid by the home consumption purchaser and the $.70 f.o.b. factory price paid by the United States purchaser.

Id. at 747.

In 1979, Congress requested that the General Accounting Office conduct a study of antidumping methodology. In that report, the GAO explained the Treasury Department methodology in great detail. Again, sample calculations provided to Congress in that study demonstrate that the Department was *still* deducting transportation costs from both U.S. price and foreign market value to achieve an ex-factory price on each side, and was continuing to make this adjustment apart from the circumstance of sale provision. General Accounting Office, Report to Congress, *U.S. Administration of the Antidumping Act of 1921* (March 15, 1979) at 24-27 (included herewith at App. 82a).

In the face of these clear explanations of administrative practice Congress never expressed disapproval of the agency practice, or the need to amend the language of the statute to preclude—or authorize—the deduction of transportation costs from the home market price. Where an agency interpretation of a statute has been brought to the

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was included in the 1958 amendments to the antidumping statute. The Treasury Department therefore continued its practice of making the adjustments for transportation costs apart from that provision in order to achieve fair, ex-factory to ex-factory comparisons.

attention of Congress, the failure of Congress to change the interpretation is presumptive evidence of its correctness. *See* Norman L. Singer, *Sutherland Statutes and Statutory Construction 2a*, § 49.10 (5th ed. 1992). *See also CBS, Inc. v. Federal Communications Commission*, 453 U.S. 367, 383-85, 101 S.Ct. 2813, 2823-24 (1981). Similarly, pursuant to the "legislative reenactment doctrine," Congress is presumptively aware of agency practice and statutory interpretation when it amends or reenacts a statute without change to the relevant provision. *See Lorillard v. Pons*, 434 U.S. 575, 580-82, 98 S. Ct. 866, 870-71 (1978) (Congress was presumed to be aware of agency interpretation of the statute, and adopted that interpretation when it selectively modified certain of those practices); *United States v. Correll*, 389 U.S. 299, 305-06, 88 S.Ct. 445, 448-49 (1967); *Ward v. C.I.R.*, 784 F.2d 1424, 1430 (9th Cir. 1986).

Both the 1957 and the 1979 studies were submitted to Congress while it was considering significant amendments to the Antidumping Act, yet Congress took no action whatsoever to change Treasury's practice, or to change the law to conform it to Treasury's practice.[21] In

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[21] In its decision below, the Court of Appeals states that in a 1985 study, the Commerce Department told Congress that it "believed it lacked statutory authorization to deduct home market transportation costs from FMV," and interpreted Congress's failure subsequently to include such authority as a rejection of the deduction. App. 9a. This statement and interpretation seriously mischaracterize the 1985 study. As the foregoing discussion demonstrates, deductions from foreign market value for transportation costs were routinely made for at least two decades prior to the cited study, and the 1985 study actually states that "we conclude that the current statutory provisions governing adjustments are adequate and provide the Department with the authority to take into account all relevant factors to ensure that antidumping calculations are made in a fair and accurate manner." "Study of Antidumping Adjustments Methodology and Recommendations For Statutory Change" (November 1985) at 62. The Department went on to note that "[u]nder current practice, the Department deducts

light of the evidence before Congress during revisions of the Act, the failure to amend the statute to expressly provide for the deduction of transportation costs from foreign market value cannot be read as a prohibition of such deductions. It must, on the contrary, be read as an approval of the established practice of the Treasury Department. In view of Congress's awareness of the Treasury Department's practice, the most reasonable explanation for the absence of an express deduction is that Congress simply saw no need for it, since the Treasury Department was already making the adjustment under the law as written.

The foregoing discussion demonstrates that the Federal Circuit improperly failed to take into consideration the substantial evidence that Congress did not, in fact, intend that the omission of a specific deduction for transportation costs from foreign market value be interpreted to prohibit the Commerce Department from making appropriate deductions to achieve a fair calculation of antidumping duties.

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foreign market delivery costs and foreign market packing costs pursuant to the implicit authority granted under [the circumstance of sale provision]." *Id.* at 63. While the Department's practice of making the deduction under the circumstance of sale provision reflects a departure from the consistent Treasury practice of making the deduction separately, two years later Commerce returned to the practice of deducting transportation costs from foreign market value apart from the circumstance of sale provision, recognizing the need to make fair comparisons. *See Industrial Phosphoric Acid From Israel*, 52 Fed. Reg. 25,440, 25,441-42 (1987), and other cases listed *supra* in note 17. In any case, the report makes very clear that the Department did not believe it "lacked authority" to make such deductions. Consequently, Congress's failure to change the foreign market value calculation in the statute cannot possibly be read as rejecting the deduction; rather, given that Commerce had *again* told Congress that it was making this deduction, the failure to amend the provision must be seen as further evidence that Congress approved of the deduction.

B. The Court of Appeals Opinion Runs Counter To an Earlier Decision Of the Same Court, Which Provided Substantive Support For the Commerce Department's Determination

It is also important to note that the Federal Circuit has previously approved the very approach taken by the Commerce Department in this case. In *Smith Corona Group, Consumer Products Division, SCM Corporation v. United States*, 713 F.2d 1568, 1578 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022, 104 S.Ct. 1274 (1984), the Federal Circuit upheld a Commerce Department regulation permitting a deduction from foreign market value for certain indirect selling expenses under the circumstance of sale adjustment to match deductions for such expenses specifically required on the U.S. price side, *even though the allowed deduction was not specifically provided in the statute for foreign market value calculations.* Generally, indirect expenses cannot be deducted from either U.S. price or foreign market value. When U.S. price is calculated on the basis of exporter's sales price, however, the statute requires the deduction of certain indirect expenses. 19 U.S.C. § 1677a(e), App. 67a-68a. A similar exception for indirect expenses in exporter's sales price comparisons is not included on the foreign market value side. In order to ensure fair comparisons, the Commerce Department promulgated a regulation providing for the deduction of indirect expenses from foreign market value in exporter's sales price comparisons, up to the amount deducted from the U.S. price—the so-called ESP offset. 19 C.F.R. § 353.15(c) (1980).

In upholding the ESP offset, the Federal Circuit acknowledged that the express language of the antidumping statute did not call for the deduction of indirect expenses from foreign market value. *See* 713 F.2d at 1578. The court did not stop there, however. It noted that the statute "*does not expressly foreclose*" the deduction, and then went on to consider the overall structure and basic purpose of the statute. The court concluded that:

> One of the goals of the statute is to guarantee that the administering authority makes the fair value comparison on a fair basis—comparing apples with apples. The offset appears to generate two fair value comparisons, apples with apples (purchase price) and oranges with oranges (exporter's sales price). The differences between United States price generated from purchase price and from exporter's sales price was created by the statute. Were it not for the exporter's sales price offset, comparisons based on purchase price would be fair, yet comparisons based on exporter's sales price would be skewed in favor of a higher dumping margin. We do not believe that the statute requires the Secretary to compare both apples and oranges with only apples. Rather, it expressly requires a fair comparison. The offset is an attempt to achieve such a comparison.

Id. (emphasis added). The court therefore upheld the ESP offset as a "proper and reasonable exercise of the Secretary's authority to administer the statute fairly." *Id.* at 1579.[22]

Pursuant to the legislative history of the antidumping statute, and the holding in *Smith Corona*, the Court of Appeals should have acknowledged the authority of the Commerce Department to make an adjustment to foreign market value which, while not expressly provided for in the statute, did not contravene the express language of the statute and instead furthered the fundamental purpose of the statute. The decision of the Court of Appeals should therefore be reversed.

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[22] The Court of Appeals below did briefly discuss *Smith-Corona* in its opinion, but dismissed it as inapplicable since it does "not apply where the Act itself clearly expresses the intent of Congress." The language of the statute at issue in *Smith-Corona* was no clearer on its face than is the language at issue here: in both cases a provision had been specifically included in the U.S. price provision, but not in the FMV provision. The Court of Appeals' offhand dismissal of *Smith-Corona* was therefore inappropriate.

II. THE COURT OF APPEALS FAILED TO GIVE PROPER DEFERENCE TO THE COMMERCE DEPARTMENT'S INTERPRETATION OF THE ANTI-DUMPING STATUTE

Absent a clear direction in the statute, substantial deference must be given to an interpretation of the statute by the agency charged with its administration. Courts have long recognized the deference due an executive agency's action. *Pauley v. Bethenergy Mines, Inc.*, —— U.S. ——, 111 S. Ct. 2524, 2534 (1991); *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782 (1984); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S. Ct. 2441, 2445 (1978). Where an agency is charged with administering a statute, part of its authority includes "the power to give reasonable content to the statute's textual ambiguities." *Dept. of Treasury, I.R.S. v. FLRA*, 494 U.S. 922, 110 S. Ct. 1623, 1629 (1990). Particularly where the agency requires expertise to administer a statute, deference is due its interpretation of the statute. *Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389, 104 S. Ct. 2472, 2479-80 (1984). Where more than general knowledge is required to understand fully the statement's policy, the agency's rational view should be accepted unless it conflicts with the statute's plain language or its legislative history. *Chevron*, 467 U.S. at 844-45, 104 S. Ct. at 2783. *See also* L. Silberman, *Chevron—The Intersection of Law & Policy*, 58 Geo. Wash. L. Rev. 821, 822-24 (1990); J. Restani, *Judicial Review in International Trade*, 37 Am. U. L. Rev. 1075, 1084-85 (1988).

The Commerce Department is charged with the administration of a particularly complex statutory scheme, requiring significant expertise and specialized understanding. As noted by the Federal Circuit on another occasion:

> The Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, establishes an intricate

> framework for the imposition of antidumping duties in appropriate circumstances. The number of factors involved, complicated by the difficulty in quantification of these factors and the foreign policy repercussions of a dumping determination, makes the enforcement of the antidumping law a difficult and supremely delicate endeavor. The Secretary of Commerce . . . has been entrusted with responsibility for implementing the antidumping law. The Secretary has broad discretion in executing the law.

Smith Corona Group, 713 F.2d at 1571 (footnotes omitted).

As explained above, the Commerce Department's determination in the investigation concerning cement from Mexico was consistent with agency practice dating back at least to 1957, and thus reflects a long-standing, well-established practice. The practice was very recently reiterated in the Commerce Department's current Antidumping Manual, where the Department stated that:

> Movement expenses, which are included in the foreign market value, are deducted from that price. . . . Movement expenses are those costs incurred by the seller in moving the merchandise under consideration from the factory to the point of delivery.

U.S. Dept. of Commerce, Import Administration, *Antidumping Manual* Chapter 8 at 13 (1993).

Since the Commerce Department's determination to deduct pre-sale transportation costs from foreign market value in the cement investigation was consistent with long-standing administrative practice and was consistent with legislative intent, the determination was entitled to tremendous deference from the courts. The Court of International Trade was therefore correct in upholding the Department's determination, and the Court of Appeals for the Federal Circuit erred in reversing that decision.

CONCLUSION

In order to settle an important issue with ramifications for the foreign policy and international economic relations of the United States, this petition for a writ of certiorari to the Court of Appeals for the Federal Circuit should be granted.

Respectfully submitted,

IRWIN P. ALTSCHULER
Counsel of Record
DAVID R. AMERINE
CLAUDIA G. PASCHE
SUZANNE M. DOHRER

MANATT, PHELPS & PHILLIPS
1200 New Hampshire Ave., N.W.
Suite 200
Washington, D.C. 20036
(202) 463-4300
Counsel for Petitioner

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